No. 96-270

(24)

In the
Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC. ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS GEORGE WINDSOR, *et al.*

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BRIEF OF RESPONDENTS GEORGE WINDSOR, ET AL.

This case involves an unprecedented "settlement class action" purporting to resolve the present and future unaccrued claims of millions of largely unidentifiable individuals who have been exposed to the asbestos products of the twenty companies known as the Center for Claims Resolution (CCR). Most notably, the settlement would extinguish asbestos-related causes of action of persons who currently suffer no physical injuries but who might, in the future, develop fatal diseases caused by asbestos. The settlement is a quasi-legislative measure that extinguishes "futures claims" by "exposure-only" plaintiffs even though those claims have not yet ripened and even though those plaintiffs may not know who they are.

Petitioners caricature the Court of Appeals' opinion as requiring that a district court "pretend that the settlement does not exist" in applying the criteria of Rule 23. Pet.Br. 1. But this Court reviews judgments, not opinions. It must look at what the Third Circuit actually *did*. Far from ignoring the settlement, the court in fact considered it extensively in applying the class certification criteria of Rule 23. Cert.App. 49a-57a.[1]

It is petitioners who ask this Court to recast Rule 23, in order to dispense with the safeguards in Rule 23(a) and (b) and to collapse the entire certification inquiry into Rule 23(e). Petitioners repeatedly concede that "litigation" here is only "hypothetical" and "assuredly *never* will occur." Pet.Br. 16, 19 (emphasis in original). Petitioners' view is that "mass-tort cases are too big and too unmanageable to be tried, but that doesn't mean that they can't be settled."[2]

To the contrary: the language, structure, and purpose of Rule 23, together with the requirements of Article III itself, all indicate that the criteria of Rule 23(a) and (b) — which refer to *actual, triable* cases — cannot be met solely by the terms of a settlement. Petitioners' claim that their radical proposal is needed to meet the exigencies of

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[1] Citations to the Appendix to the Petition for Certiorari are styled "Cert.App. __." Citations to the Brief of Petitioners are styled "Pet.Br. _." Citations to the Joint Appendix in this Court are styled "JA __."

[2] Edward Felsenthal, *Court to Consider Asbestos Settlement*, Wall St. J., Nov. 4, 1996, at B11 (quoting Mr. Aldock, counsel of record for petitioners other than GAF Building Materials, Inc.).

mass tort litigation is an argument for Congress, not this Court. In any event, although the Third Circuit opined that "'there is no language [in Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes'" and that "'a class is a class is a class'" (Cert.App. 19a, 38a) (citation omitted), the Court of Appeals in fact *endorsed* the use of settlement class actions. *Id.* at 36a, 37a n.9. Contrary to the impression left by CCR, only one court (*see In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996)) has *ever* certified a class action like this — involving millions of persons, the vast majority of them uninjured (some of them as-yet unborn), with claims that would not be triable *even in individual actions*, and whose sole common characteristic is that they *might someday* seek damages from the same group of defendants. And even the Fifth Circuit indicated that it would not have certified a class on the facts of this case.

Moreover, this case fails the Article III case or controversy requirement because it is a feigned case brought ostensibly on behalf of persons who have suffered no injury in fact. There is no federal subject-matter jurisdiction even to consider petitioners' arguments.

STATEMENT OF THE CASE

1. Background and Procedural History. This singular proceeding began in an extraordinary fashion. After judicially sponsored attempts to negotiate settlements of *pending* asbestos cases had stalled, CCR "decided to approach" two plaintiffs' lawyers (not the other way around) in an effort to resolve *future* asbestos claims *before they accrued*. JA 626. CCR's CEO testified that he "decided to target" Gene Locks and Ron Motley, the plaintiffs' attorneys who eventually became class counsel in this case. JA 427. As CCR's executive put it, "We picked them." *Id.* Prior to suit, CCR agreed to pay class counsel's fees as part of the stipulation of settlement (JA 100) — in effect agreeing to pay the fees of an opponent for instituting a class action against them.

While putative class counsel were negotiating on behalf of the as-yet-unformed class of future claimants, they simultaneously represented 14,000 plaintiffs who had already filed lawsuits against CCR. Before the class negotiation concluded, class counsel settled

those "present" cases with CCR for a total of $215 million in cash, including attorneys fees of approximately $70 million. JA 560. Only after CCR was sure that the class action would be consummated did it agree to these inventory settlements, the most important of which were signed on the eve of the filing of the class action. JA 445-47, 530.[3] Also prior to suit, class counsel entered into contingent, side agreements, enforceable if the class action settlement fell through, that would contractually prevent class counsel from filing "exposure-only" or other claims against CCR that did not meet the stringent medical criteria ultimately included in the class action settlement. JA 445-46, 534-35, 557, 766-67. After the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 93-371 holding such agreements unethical, and after the class action had been attacked as a feigned and collusive suit, petitioners modified the agreements in June and July 1993 to bind class counsel, contractually, to "recommend" to their clients that they not file exposure-only claims but instead accept the medical criteria included in the settlement. JA 429; Cert.App. 191a-193a. CCR did not view this commitment as any less binding on class counsel; its chief operating officer testified that "in my experience in litigation over some 14 years, rarely does a client reject advice of counsel, so I didn't view the 'will recommend' as being significantly different than the 'will not file.'" JA 769.

On Jan. 15, 1993, CCR and counsel for the putative class simultaneously filed a class action complaint, an answer by the defendants, a joint motion by the parties to certify the case as a class

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[3] CCR's CEO testified that "in 1991 we had resolved not to settle large blocks of present inventories of asbestos claims absent some commitment to the future." JA 667. He explained that "we indicated to [class counsel] that once we believed that there was some rational way of dealing with the futures, that we were prepared to address the settlement of pending cases." JA 761. He added that there came a point in 1992 "when we became reasonably confident that the Georgine negotiations [in this case] would become successful," and CCR "then changed our position from not doing inventory settlements without pleural registries, to doing inventory settlements in exchange for commitments on the future." JA 667. "Without a degree of confidence that the Georgine discussions would be successful, we would not have done the present inventory settlements." JA 668.

action "for settlement purposes only," and the proposed settlement that CCR had previously negotiated with its own hand-picked attorneys for the plaintiff class. There were no motions, no discovery requests, and no preliminary litigation of any kind. In a very real sense, this case was settled before it was filed.

The class that the plaintiffs purport to represent, described by the Third Circuit as "humongous" (Cert.App. 42a), includes all persons (including their present and future family members) who were occupationally exposed to CCR's asbestos products but who (whether injured or not) had not filed suit as of Jan. 15, 1993. The selection of that date as an artificial boundary allowed class counsel to gerrymander the class to exclude their then-existing inventories of asbestos plaintiffs, whose cases were settled outside the class action on strikingly different terms. *See* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1051-64 (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1393-95 (1995). The class comprises both individuals who currently have asbestos-related illnesses (and survivors of persons who have already died of asbestos-related diseases), and other individuals (probably numbering in the millions)[4] who were occupationally exposed to asbestos but who have not yet developed, and may never develop, any physical injuries related to the exposure.

Five of the nine named plaintiffs alleged that they had sustained physical injuries from CCR's asbestos products. Four of the named plaintiffs, however, expressly alleged that they had not yet sustained an asbestos-related "condition." JA 5, 7, 9-10. These exposure-only representative plaintiffs, who were indispensable to "representing" the vast class of currently uninjured persons, conceded in discovery and in sworn testimony at the fairness hearing that "absent the settlement, they did not intend to pursue the claims in the class complaint. They claimed no damages and no present injury." Cert.App. 66a (Wellford, J., concurring).

The settlement would resolve all claims for asbestos-related physical injuries that have occurred or may occur in the future by

[4] *Jackson v. Johns Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985) (en banc) (estimated 21 million Americans have been exposed to asbestos).

channelling the claims to an administrative claims process to be established and operated by CCR. The administrative process requires that claimants satisfy strict medical criteria (concededly "more stringent" than otherwise applicable state law, JA 916) in order to qualify for payment of compensation. CCR will then offer compensation to qualifying claimants in amounts within a predetermined range, but the settlement caps both the number of claims that can be paid in any given year and the amount that can be paid to individual claimants. The "case flow maximums" provide, for example, that in the first year of the settlement CCR is required to pay no more than 700 lung cancer cases, 700 mesothelioma cases, and 200 "other cancer" cases. JA 108-09. If more qualifying claims are filed, a queue will result, and claimants may be required to wait for years (and possibly never be paid). By comparison, in 1992, CCR settled 25,000 claims. Cert.App. 144a; *see* Coffee, *Class Wars*, 95 COLUM. L. REV. at 1397 & n.207 (25,000 claims/year between 1989 and 1993). Although the class members are bound to the settlement in perpetuity, the defendants are not: each defendant is free to withdraw from the settlement after ten years. Cert.App. 25a-26a; *see also* JA 101-02.

Unrebutted evidence indicates that approximately half the claims that are filed in state and federal court, and currently paid by CCR, would not qualify for payment under the exposure and medical criteria contained in the settlement. JA 808, 838. The claims asserted by the exposure-only plaintiffs in the complaint — claims for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring — receive no payment or other remedy under the settlement. Cert.App. 49a. In addition, "pleural" claims, which involve asbestos-related plaques on the lungs but no physical impairment, receive no cash compensation, "even though such claims regularly receive substantial monetary payments in the tort system." *Id.* at 26a.

The evidence showed that the compensation provided by the settlement was far below average awards in the tort system.[5]

[5] For all high value mesothelioma claims, for example, the national average CCR settlement is $359,715 as contrasted with the $200,000 maximum allowed under the settlement for non-extraordinary claims. JA 461. Fifteen percent of

Payment under the settlement is not adjusted for inflation. Cert.App. 25a, 50a. In addition, the class settlement is significantly less favorable than the $215 million inventory settlements negotiated by class counsel as side deals on the eve of the class action. The inventory settlements provided for cash payments to many present clients who would not have qualified for any compensation under the class settlement. JA 771. Individual clients in the inventory settlements received at least a 54% premium over the maximum average payment under the class action.[6]

The settlement theoretically allows claimants who are dissatisfied with the compensation offered by CCR to "exit" to the tort system, but drastically limits the number who can do so to "a few persons per year." Cert.App. 49a; *see also* JA 87. If even a small percentage of class members seek such relief, the backlog will shortly exceed 15 years. *E.g.*, JA 917. Further, claimants who seek to exit to the tort system must still meet the settlement's stringent medical criteria, must waive any punitive damages claim, must comply with numerous procedural requirements, and will receive any compensatory damages in excess of 150% of CCR's last offer spread out over five equal, annual installment payments. JA 87-90.

2. The District Court's Decision. Two weeks after suit was filed, the district court conditionally certified the proposed class without any notice to putative class members, without a hearing, and

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current mesothelioma claims arise in California, and the statewide average of these claims is $419,674 — or more than 209% above the maximum allowable recovery under the settlement. *Id.* Although the settlement contains an "extraordinary claim" process that would permit certain mesothelioma claims to be settled at an average of $300,000, this process could not accommodate even 25% of predicted California mesothelioma claims — even ignoring mesothelioma claims arising in other states. JA 461. And the problem of undercompensation is by no means limited to California or to mesothelioma claims. The evidence showed that, through 1991, CCR settled some 1,116 mesothelioma, lung cancer, other cancer, and non-malignant claims nationwide (for a total of almost $104 million) in amounts that exceeded the proposed maximum value for non-extraordinary claims under the settlement. JA 464-68.

[6] *See* Coffee, *Class Wars*, 95 COLUM. L. REV. at 1397. If this figure is inaccurate, it is because Coffee *underestimated* the premium received by the inventory plaintiffs. *Id.* at 1397 n.210, 1398.

without the receipt of evidence. Cert.App. 70a.

Respondents and other absent class members challenged the class action and settlement under Fed.R.Civ.P. 23, the "case or controversy" requirement of Article III, standing, the notice requirements of due process, 28 U.S.C. § 1332 (relating to amount-in-controversy subject-matter jurisdiction), personal jurisdiction, and on other grounds. Joined by labor unions, asbestos victims' groups, and the States of Texas and Alabama, respondents also vigorously challenged the fairness of the proposed settlement. Thirty-seven law professors who teach or write in the area of professional responsibility submitted an amicus brief contending that insuperable conflicts of interest existed within the plaintiff class and between class counsel and their supposed clients.[7]

For their part, petitioners conceded on the record that "this case cannot meet the various requirements of Rules 23(a) and 23(b) when viewed as a litigation class." JA 131. Petitioners acknowledged that the case had not been brought "for purposes of litigation" nor had it been "actually litigated for some period of time," but was instead "brought for purposes of settlement only," and the settlement had been reached "before a class action was commenced." JA 123. Indeed, CCR has previously averred that "asbestos claims cannot be fairly handled in mass proceedings ... because, at bottom, each claim is different with respect to most elements of each plaintiff's cause of action." JA 437.

The district court denied all objections to jurisdiction and certification, ruled that the settlement was fair to the class, and tentatively approved the settlement. The court did not enter a final, appealable judgment, in part because of the pendency of a third-party action by petitioners against their insurers seeking a declaration that their settlement did not violate any provision of their insurance policies. Cert.App. 24a n.4, 276a. The district court did, however, enter a preliminary injunction prohibiting class members from filing asbestos-related damages suits against CCR in the state or federal courts, effectively requiring class members to pursue any asbestos-related claims against CCR under the terms of the settlement.

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[7] Dist. Ct. Dkt. No. 991 (Apr. 4, 1994). The district court refused to permit the brief to be filed. Dkt. No. 1010 (Apr. 11, 1994).

3. The Court of Appeals' Decision. On appeal, the settling parties reiterated that "certification of the present class would be inappropriate in the absence of the court-approved settlement." Appellees' Br. in Ct. App. at 101 n.85. The Third Circuit unanimously vacated the injunction and remanded the case to the district court with instructions to decertify the class. It expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction." Cert.App. 19a. Ultimately, however, the Court of Appeals elected to pass over these issues because it deemed the class certification question dispositive. *Id.*

The Third Circuit held that the class could not meet the Rule 23(a) requirements of typicality and adequacy of representation, or the Rule 23(b)(3) requirements of predominance and superiority. The court explained that the class members' claims vary widely in character. "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." Cert.App. 41a. These factual differences translate into significant legal differences. "Differences in amount of exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff." *Id.* The application of 50 different sets of state laws in this nationwide diversity class action would "exponentially" compound the problem. *Id.* at 41a-42a.

With respect to adequacy of representation, the Court of Appeals held that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement" of Rule 23(a)(4). Cert.App. 49a. The court focused on the settlement, explaining that it "makes numerous decisions on which the interests of different types of class members are at odds." *Id.* Further, the Court of Appeals found that Rule 23(b)(3)'s requirement that the class action be "superior to other available methods for the fair and efficient adjudication of the controversy" was not satisfied in part because the settlement's denial of delayed opt-out rights to currently uninjured class members raised "serious fairness concerns." *Id.* at 57a. The court concluded that it would "leave legislative solutions to legislative channels." *Id.* at 20a. "[W]hat the district court did here might be ordered by a legislature, but should not have been ordered by a court." *Id.* at 59a.

In a concurring opinion, Judge Wellford "fully subscribe[d]" to the panel's decision "that the plaintiffs in this case have not met the requirements of Rule 23," Cert.App. 60a, but wrote separately to express the view that the exposure-only plaintiffs, who "claimed no damages and no present injury ... had no standing to pursue this class action suit" and hence could not be bound by the result. *Id.* at 66a.

SUMMARY OF ARGUMENT

I. This Court lacks subject-matter jurisdiction even to consider petitioners' arguments, because this proceeding is not a justiciable case or controversy under Article III. This was a feigned, non-adversarial proceeding between CCR and class counsel for the common purpose of binding absent persons to the Stipulation of Settlement. There was never any good faith intent to litigate this proceeding for any other aim. *United States v. Johnson*, 319 U.S. 302 (1943); *Muskrat v. United States*, 219 U.S. 346 (1911).

Further, the "exposure-only" claimants that make up the vast majority of the class cannot be bound by the judgment because they lack standing to invoke federal jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In sworn testimony quoted at length by the concurring judge below, the class plaintiffs testified that they suffered no harms that conceivably qualify as "injury in fact."

Finally, the exposure-only plaintiffs fail the "redressability" requirement of standing, because the claims they assert — emotional distress, the enhanced risk of developing asbestos-related disease, and the need for medical monitoring — are in no way remedied by the stipulation for which they seek federal judicial approval. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

II. This case could not be certified under Rule 23. Petitioners concede that the requirements of the Rule could not be satisfied if the case were litigated. Yet they insist that the criteria of Rule 23(a) and (b) may be met solely by reference to the settlement. But the criteria plainly refer to issues in *triable* cases. Article III, the purpose and structure of Rule 23, and the Rules Enabling Act all confirm that Rule 23 does not permit certification in non-triable cases predicated wholly on a settlement. Class certification cannot be collapsed into the

fairness inquiry mandated by Rule 23(e).

III. The judgment must be affirmed regardless of how this Court answers the question presented. Petitioners' caricatures aside, the fact is that the Third Circuit considered the settlement extensively in holding that Rule 23 could not be satisfied. The settlement only underscores that the requirements of adequate representation, superiority, predominance, and typicality cannot be met here. Petitioners err in relying on the district court's contrary findings, for they cannot bind this Court on the legal questions of whether the Rule 23 criteria are fulfilled.

ARGUMENT

I. THIS CLASS ACTION IS NOT A JUSTICIABLE CASE OR CONTROVERSY UNDER ARTICLE III

A. This Class Action Is A Feigned Suit Over Which The Federal Courts Have No Jurisdiction

Article III, § 2 provides that the jurisdiction of the federal courts extends only to "cases" or "controversies." This Court has found "unfit for adjudication" any cause that "'is not in any real sense adversary,' that 'does not assume the honest and actual antagonistic assertion of rights,'" and which thereby violates "a safeguard essential to the integrity of the judicial process." *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (quoting *United States v. Johnson*, 319 U.S. 302, 305 (1943)).

The burden of proving justiciability rests on those who invoke federal jurisdiction (here, the settling parties). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). If "challenged by his adversary," the party asserting jurisdiction cannot rest on his allegations and must prove jurisdiction by a "preponderance of evidence." *McNutt v. GM Acceptance Corp.*, 298 U.S. 178, 189 (1936). *See also Lujan*, 504 U.S. at 561, 566 n. 3. Article III compels a court to look beyond the pleadings to the actual state of affairs when the complaint was filed, in light of all that has been learned. A court is not bound by what plaintiffs and defendants alleged as to adversity: "Formal agreement between the parties that collides with plausibility is too fragile a

foundation for indulging in ... adjudication." *Poe v. Ullman*, 367 U.S. at 501. *See also City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 180 (1905) ("Court will look beyond the pleadings and arrange the parties according to their sides in a dispute").[8]

In *United States v. Johnson*, 319 U.S. 302 (1943), this Court dismissed for want of a case or controversy a cooperative lawsuit brought by a tenant against a landlord, at the landlord's behest and expense, to vindicate the landlord's interests. The Court noted that the case "was instituted as a 'friendly suit' at [the defendant's] request;" that the plaintiff was represented by "counsel who was selected by [defendant's] counsel" in advance of the lawsuit; that the defendant agreed in advance to pay the plaintiffs' counsel for bringing the suit; that at some points in the litigation the plaintiff's counsel presented no brief or argument; and that the nominal plaintiff hadn't read the complaint filed in his name, had little knowledge of the suit, and had "no active participation" in it. *Id.* at 304-05. *See id.* at 304 ("Even in a litigation where only private rights are involved, the judgment will not be allowed to stand where one of the parties has dominated the conduct of the suit by payment of the fees of both."); *Cleveland v. Chamberlain*, 66 U.S. 419, 425-26 (1861) (defendant, through a friendly plaintiff, "now carries on a pretended controversy by counsel, chosen and paid by himself, ... for the evident purpose of obtaining a decision injurious to the rights and interests of third parties.").

The same sort of charade took place here. CCR selected and

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[8] These arguments were raised in both courts below and in the Briefs in Opposition to Certiorari. Windsor Opp. Cert. 26-30; White Lung Opp. Cert. 19-20. Judge Wellford concluded in his concurring opinion that the case was nonjusticiable. Cert.App. 60a-66a. Although the rest of the Third Circuit panel pretermitted the jurisdictional issues by resolving the case in favor of the objectors on other grounds (Cert.App. 34a), it expressed "serious doubts" as to justiciability. Cert.App. 19a. Since the issue goes to the basis of federal jurisdiction under Article III, this Court must address it in any event. *Metro. Wash. Airports Auth. v. Citizens For Abatement of Aircraft Noise*, 501 U.S. 252, 265 n.13 (1991). Moreover, as the prevailing party, respondents are entitled to defend the judgment on any ground raised below and preserved in the oppositions to certiorari, whether or not it was relied upon by the Court of Appeals. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n. 20 (1979).

"approached" class counsel to arrange a class action to resolve future asbestos claims before they accrued. JA 626. CCR chief executive officer Lawrence Fitzpatrick testified that, before it initiated these meetings, CCR had worked out "a framework for how they wanted this class structured." JA 428. CCR "decided to target" Ron Motley and Gene Locks, the plaintiffs' lawyers who became class counsel. JA 427. In CCR's words, "We picked them." *Id.* CCR agreed before the class suit was filed to pay class counsel's fees for instituting a class action against CCR to resolve all future asbestos claims. JA 100, ¶ XIX.[9] And class counsel agreed that, even if the settlement fell through, class counsel would abide by the strict medical terms of the settlement and advise their clients not to bring exposure-only claims against CCR. *See* p. 3, *supra*. That is, plaintiffs' class counsel made contractual commitments to the defendant, CCR, which dictated the legal advice that class counsel would provide to their own clients suing CCR.

CCR and class counsel choreographed the simultaneous filing of the complaint, answer, joint motion for class certification and the stipulation of settlement. JA 2. Class counsel and CCR uniformly took the same position and sought the same relief on every motion and appeal in this case. The settling parties' coordinated pleadings are what Justice Holmes once called a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not

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[9] The district court asserted that agreements by settling defendants to pay class counsel's fees are "standard practice" (JA 222), but in *none* of the cases cited by that court as endorsing this "practice" did the defendant select class counsel and agree, as CCR did here *before* the commencement of litigation against it, to pay their fees. It is not "standard practice" for a defendant threatened with many lawsuits to pay the counsel fees of a putative opponent for *instituting* a class action against it. The district court further erred in holding that it could not deem this class action to be a nonadversarial "product of collusion" unless it involved "fraud" or a "secret combination or conspiracy." Cert.App. 260a-261a. No "fraud or trickery" on the court is required to render a friendly lawsuit nonjusticiable. *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 344 (1892). A case need not be "'collusive' in the derogatory sense," it need only reveal "a want of a truly adversarial contest, of a collision of actively asserted and differing claims." *Poe v. Ullman*, 367 U.S. at 505. The district court's use of an faulty legal standard fatally undermines all of its factual findings on justiciability.

exist." *City of Dawson*, 197 U.S. at 181.

As in *United States v. Johnson*, class counsel here often did not bother to argue or present briefs, relying instead on CCR's counsel to make the alleged class's case to the courts below. The Third Circuit held a six-hour oral argument and sent a memo to counsel specifically inviting argument on a host of issues for which plaintiff class counsel bear responsibility, including adequacy of representation, justiciability, and adequacy of notice, yet class counsel did not participate in that argument beyond taking a minute to introduce themselves to the court. Nor did class counsel even bother to petition for certiorari when the Third Circuit decertified their class action. Furthermore, notice to the plaintiff class was handled by a communications company chosen by, paid by, and exclusively directed by CCR. JA 484-85, 491-92. The consultant who designed and implemented the notice campaign (JA 321) testified that class counsel played no role in that campaign and failed to provide "any ideas" or "any input" whatsoever on how to conduct the notification program on which class counsel relied to provide due process to the millions of absent class members whom they purported to represent. JA 490-92. Class counsel even permitted CCR's attorneys to prepare the class representatives for their depositions. Cert.App. 204a.

To their credit, petitioners concede here (as they have conceded throughout this proceeding) that adversarial "litigation" in this matter is purely "hypothetical" and "assuredly *never* will occur." Pet.Br. 16, 19 (emphasis in original). *See also* JA 123, 126 (both settling parties concede that this case "was brought for purposes of settlement only"). In his concurring opinion below, Judge Wellford quoted extensive testimony in which *all* of the "exposure only class representatives admitted under oath that they would not have continued with the litigation in the absence of a settlement." Cert.App. 62a. All of the representative plaintiffs "clearly conceded" that, "absent the settlement, they did not intend to pursue the claims in the class complaint." *Id.* at 66a. They "stated emphatically that they were not seeking damages of any kind at the time the complaint was filed" (*id.* at 65a), and that they brought suit only to obtain judicial endorsement of the settlement. *Id.* at 62a-66a. The class representatives were accordingly uninvolved in the class action proceedings. Some testified that they did not know that the class complaint sought

damages on their behalf, and that they had never authorized class counsel to sue for damages. *Id.* at 65a; JA 416. Others were unaware that the class action had been settled in Jan. 1993 until they were told this — by counsel for objectors — during depositions more than a year later. JA 353-54, 358, 389.

It is unsurprising that the class plaintiffs lacked interest in their own claims for increased risk of future injury, fear of future injury, and medical monitoring, because *class counsel had never asserted such claims on behalf of any other client in their twenty years of asbestos litigation, and CCR had never paid such a claim.*[10] Indeed, such claims do not even exist under state law in most jurisdictions. *See* n. 17, *infra*.[11] Furthermore, on the eve of filing the class action, class counsel separately agreed in writing not to prosecute such exposure-only claims against CCR in the event that the settlement were to fall through, which confirms that class counsel had no bona fide intent to litigate the claims alleged in the complaint. *See* p. 3, *supra*. It is therefore beyond cavil that the claims in the class complaint were not alleged in good faith but were presented only as a pretext for obtaining federal jurisdiction to approve a settlement that had nothing to do with those claims.

In short, this is a joint venture, not an adversarial lawsuit. A federal court's only constitutionally permissible option when such circumstances appear is to dismiss the action for lack of subject-matter jurisdiction. In *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971), both sides argued the same position and jointly sought the same ruling — a judicial determination that a statute was constitutional. *Id.* at 47. "[C]onfronted with the anomaly that both litigants desire precisely the same result," this Court held

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[10] The chief operating officer of CCR testified that CCR had never settled a claim for medical monitoring or emotional distress from asbestos exposure in which the claimant did not also allege actual physical injury, and that he did not recall that class counsel had ever asserted a claim against CCR that did not involve actual physical injury. JA 448.

[11] Whether such claims might be found under the Federal Employers' Liability Act, *see Metro-North Commuter R.R. Co. v. Buckley*, No. 96-320 (pending), is irrelevant in this diversity suit (although it may be of individual interest to those absent class members who may one day have asbestos claims under FELA).

that "[t]here is, therefore, no case or controversy within the meaning of Art. III of the Constitution." *Id.* at 47-48.

In *Muskrat v. United States*, 219 U.S. 346 (1911), this Court dismissed for want of a case or controversy a friendly suit brought by several Indians in a representative capacity on behalf of all other similarly situated members of their tribe, in order to obtain a judicial ruling on the legality of a claims resolution scheme. *Id.* at 360. The Court noted that the defendant (like CCR in the present case) had invited the lawsuit and agreed in advance to pay the plaintiffs' attorneys fees, and had "no interest adverse to the claimants." *Id.* at 360-61.

In *Chicago & G.T.Ry. Co. v. Wellman*, this Court condemned "a friendly suit between the plaintiff and the defendant to test the constitutionality of [a particular piece of] legislation." 143 U.S. at 344. Equal condemnation is in order here for the settling parties' "friendly suit" to "test" the viability of — and thereupon to impose as national law — their proposed administrative solution to asbestos litigation. The parties have not squared off in this litigation to oppose one another or to resolve a clash of antagonistic interests. They have instead joined forces to seek an identical result: court approval of the stipulation of settlement for the purpose of binding millions of "exposure-only" plaintiffs in all 50 states who have not been injured by asbestos but whom CCR fears may one day become sick and then decide to sue — thereby upsetting CCR's hopes for putting its asbestos torts behind it. But for more than a century this Court has reserved its greatest condemnation for those friendly suits brought to "obtain an opinion of this court affecting the rights and interests of persons not parties to the pretended controversy." *Cleveland v. Chamberlain*, 66 U.S. at 426.

Both the settling parties and the district court conceded that "this class action was settled before the complaint was filed" (JA 218), and the district court found that this action "lacks a dispute as to the *remedy*." JA 222 (emphasis added). The district court excused this lack of adversity in the *case itself* because it was *preceded* by "long, arduous" "*negotiations*." JA 218 (emphasis added). But tough "negotiations" are commonplace both in private contractual dealings and in the legislative process, so they can hardly distinguish those processes from federal litigation. How much struggle took place

before the pleadings were submitted to the district court — that is, before a lawsuit existed even in name — proves absolutely nothing about the existence of a justiciable controversy *in that court*.

To the same effect is the district court's argument that adversity obviously exists here because everyone knows that the "legal interests" of "asbestos manufacturers" and "asbestos victims" have been "diametrically opposed" throughout "the twenty-year history of asbestos litigation." JA 218. But that confuses an almost Marxist analysis of class struggle with the *adjudicative adversity* required by Article III.

Both the district court and the settling parties relied on consent decree cases to argue that the joint venture class action in this case is neither unusual nor nonjusticiable. JA 219-20. But the record in this case conclusively establishes (and the settling parties themselves concede) that there was *never* any intent to litigate the claims in the complaint and that this case was concocted for settlement purposes *only*. By contrast, in the consent decree cases, there was every reason to think that, if the defendants had not consented to the decrees banning future misconduct, and if those decrees had not been approved by the courts, the government and the private parties who opposed it would have gone back to litigating against each other as they had been preparing to do.[11]

The settling parties are attempting to use the federal courts not as a forum in which to litigate their differences – for they have none – but as an ad hoc, junior-varsity Congress. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). Congress has declined the invitation to enact a legislative solution to the asbestos litigation problem. *See* Report of the Judical Conference Ad Hoc Committee on Asbestos Litigation 3 (Mar. 1991) ("committee firmly

[11] After all, the consent decree cases involved continuing conflict between the parties over *future* misconduct by the defendants that had to be addressed by an injunction. *See Swift & Co. v. United States*, 276 U.S. 311, 326 (1928) (injunction concerned "not with past violations, but with *threatened future ones*") (emphasis added); *SEC v. Randolph*, 736 F.2d 525, 527-28 (9th Cir. 1984) (case justiciable because of "prospective injunctive relief" against "future violations of securities laws" barring insider trading). *Cf. Northeastern Fla. Contractors v. Jacksonville*, 508 U.S. 656, 662 (1993) (voluntary cessation of challenged conduct does not deprive federal court of jurisdiction to determine legality of practice).

believes that the ultimate solution should be legislation ... creating a national asbestos dispute resolution scheme"). The settling parties therefore want the federal judiciary to convert their privately negotiated compensation schedule into a nationwide rule of law binding on all absent class members. But the very purpose of the case or controversy requirement is to restrict the judicial branch to the adjudication of distinct, ripe disputes between bona fide adversaries. Our Constitution simply did not grant federal courts the power to legislate solutions, even in response to the most pressing of problems: "It is not for [the federal judiciary] to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case." *Whitmore v. Arkansas*, 495 U.S. 149, 161 (1990).

B. The "Exposure-Only" Plaintiffs Lack Standing To Invoke Federal Jurisdiction

1. The plaintiffs have no injury in fact

To establish standing under Article III, a litigant must demonstrate "that he has suffered an 'injury in fact.' That injury, we have emphasized repeatedly, must be *concrete in both a qualitative and a temporal sense*." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (emphasis added). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This requirement "confines the Judicial Branch to its proper, limited role in the constitutional framework of government." *Id.* at 581 (Kennedy, J., joined by Souter, J., concurring in part and in the judgment); *see also Allen v. Wright*, 468 U.S. 737, 750 (1984).

The most remarkable thing about the exposure-only plaintiffs is that their allegations of injury do not simply fall short of the Art. III standard — those plaintiffs affirmatively disclaim *any* concrete injury, however slight. *Plaintiffs specifically declare that they have no "asbestos-related condition" whatsoever* — no disease, no impairment of health, no shortness of breath, nothing. JA 5, 7, 9, 10 (Complaint). The only claims alleged by the exposure-only plaintiffs are: (1) "emotional distress arising from ... the fear of contracting an

asbestos-related condition" in the future (JA 18); (2) the "enhanced risk of future condition" from past asbestos exposure (JA 18); and (3) the need "to undergo medical surveillance in order to ... permit early medical diagnosis or treatment of any such condition" that might arise in the future. JA 20. In his concurring opinion below, Judge Wellford concluded that such "'futures claims' ... do not confer standing on these exposure only plaintiffs." Cert.App. 60a.

Judge Wellford reviewed in detail the sworn testimony in which the class plaintiffs flatly disavowed even these allegations of present consequences of feared future injuries. The exposure-only class representatives testified that, the allegations of the complaint notwithstanding, they were "not suffering any emotional distress" on account of their asbestos exposure. JA 450; Cert.App. 63a; JA 421. These plaintiffs further testified that, again contrary to what had been alleged in their complaint under sanction of Fed.R.Civ.P. 11, they had incurred no expenses from paying for medical monitoring and sought no payments for (or a system to provide for) future monitoring from CCR. JA 370, 375, 393. Finally, the exposure-only plaintiffs testified that they had suffered no monetary injury from their asbestos exposure (Cert.App. 63a, 64a; JA 374-74, 395, 398, 415, 449-50, 749-50, 755) and "stated emphatically" that they "didn't deserve any money and didn't want any money." Cert.App. 65a, 66a. The settling parties formally conceded below that the exposure-only plaintiffs "had not incurred monetary loss at the time the complaint was filed." Appellees' Br. in Ct. App. at 20. Even the district court described them as lacking "presently-manifested injury." JA 314.

Having forsworn the injuries alleged in their own complaint, the exposure-only plaintiffs are left with nothing more than the allegation that, like tens of millions of other Americans, they have been occupationally exposed to asbestos. They assert that, as a result of inhaling asbestos fibers, they have experienced "cellular changes in their lungs" (JA 16), changes that are undetectable by medical science. Astonishingly, the district court deemed these allegations sufficient and held that "exposure to a toxic substance constitutes sufficient injury in fact to give a plaintiff standing to sue in federal court." JA 200. The court thus equated mere exposure to something that might someday injure you with the actual resulting injury itself.

This cannot be the law. An allegation that one has been exposed

to something potentially harmful is mere autobiography that could not constitute an "injury in fact" absent a reconstruction of Article III doctrine that would transmute "injury in fact" into "hypothetical risk of injury in the future," and thereby reduce the requirement to a nullity. The plaintiffs' allegations of "fear" and "risk" of developing an asbestos-related illness in the future are "'unadorned speculation' insufficient to invoke the federal judicial power." *Whitmore*, 495 U.S. at 158. "Allegations of possible future injury do not satisfy the requirements of Art. III." *Id.* Accordingly, the concurring opinion below concluded that "[f]ear and apprehension about a possible future physical or medical consequence of exposure to asbestos is not enough to establish an injury *in fact*." Cert.App. 61a (emphasis in original).

The added assertion that, having been exposed, one has experienced undetectable "cellular changes" adds nothing whatsoever, because Article III requires a "factual showing of *perceptible* harm." *Lujan*, 504 U.S. at 566 (emphasis added). The district court's holding that alterations in biological or physical structure traceable to mere exposure constitute injuries proves far too much. Everyone in this country has been exposed to environmental toxins of one sort or another — from cigarette smoke to asbestos to dioxin to ultraviolet radiation caused by ozone depletion — and can likewise lay claim to such unverifiable "cellular changes."[13] But that does not give them standing to sue *now* on the conjecture that one day they might suffer an injury caused by that exposure. Article III's requirement of actual or imminent injury "has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury

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[13] "Asbestos is used in so many products ... that probably everyone in the civilized world has inhaled at least some of this material." J. Peterson, INDUSTRIAL HEALTH 66 (2nd ed. 1991). Yet it is undisputed that the overwhelming majority of "exposure-only" plaintiffs will never develop asbestos-related injuries. *See* Selikoff & Lee, ASBESTOS AND DISEASE 207 (1978). Until its flip-flop in the instant case, CCR itself argued that equating mere exposure to asbestos with "injury" would "revolutionize" tort law by "mak[ing] every individual in the United States a potential plaintiff, inasmuch as we all are exposed to and inhale asbestos fibers every day." JA 431.

at some indefinite future time." *Lujan*, 504 U.S. at 564 n.2.[14]

The district court dismissed *Lujan* in a footnote (JA 200 n. 11) and relied instead on *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978), which the district court read as holding that mere exposure to radiation constitutes an injury in fact under Article III. JA 194-97. This analysis (which was properly rejected by Judge Wellford in the Court of Appeals, Cert.App. 61a) ignores the fact that the plaintiffs in *Duke Power* sought only *prospective* declaratory relief. The Court was not asked to rule on the question analogous to the one presented here: to wit, whether mere exposure to radiation conferred standing to pursue *compensatory* relief *now* for personal injuries that might arise at some point in the future. The distinction is crucial. As this Court held in *Los Angeles v. Lyons*, 461 U.S. 95, 103-108 (1983), Article III standing cannot be determined without reference to the precise relief sought by the plaintiff. There, this Court concluded that the fact that plaintiff Lyons had been the victim of a police choke-hold in the past, and therefore had standing to sue the police for damages for that palpable injury, did not confer standing to seek injunctive relief against future improper use of choke-holds, because the speculative risk of someday being choked again did not constitute a concrete, particularized and imminent injury. 461 U.S. at 105, 106 & n.7. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 116 S. Ct. 2174, 2181-82 n.6 (1996). The right to seek one sort of relief for a given injury does not necessarily confer the right to seek other relief for other injuries that have not yet (and may never) occur.

While Lyons had standing to seek compensatory but not injunctive relief, here (and, presumably, in *Duke Power*[15]) the converse is true.

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[14] While the district court below was diluting standing doctrine, in the same district court the judge presiding over the MDL proceeding involving all pending federal asbestos claims was employing the traditional concepts of ripeness and injury-in-fact to dismiss some 18,000 asbestos cases on grounds that they were not "ripe and ready to proceed" because the plaintiffs "have no asbestos related injury." *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 239863 at *5 (E.D.Pa. May 2, 1996).

[15] The only holding, as opposed to dictum, in *Duke Power* was that the thermal pollution of a lake resulting from a nuclear power plant conferred upon occupants

Although the exposure-only plaintiffs might in some circumstances arguably have standing to seek an injunction protecting them from further exposure to an environmental toxin (*e.g.*, in a workplace), they have no standing to seek recovery now of compensatory relief for past exposure that has not yet (and will probably never) cause them concrete injury.[16]

If *Duke Power* were nevertheless read to establish that mere past exposure confers standing here and now to seek compensatory relief for speculative future injuries, the case simply could not be reconciled with more recent decisions such as *Lujan* and *Whitmore*. To hold that Article III's requirement of a concrete, imminent, non-conjectural injury "means nothing more than 'in this lifetime,'" is to undertake "quite a departure from [this Court's] precedents." *Lujan*, 504 U.S. at 564 n.2.

Even if this case did fall within constitutional boundaries, the exposure-only plaintiffs would nevertheless lack standing under prudential principles. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). It is inconceivable that healthy, uninjured exposure-only plaintiffs are the "litigants best suited to assert [the] particular claim[s]" for cancer and other ills of those unknown, unlucky class members who, ten or twenty years from now, will actually get sick and die from their asbestos exposure. *Id.* at 100.

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of the adjoining land standing to seek preventive declaratory relief against construction of the plant (by challenging the federal law that capped liability for nuclear accidents and thereby increased the likelihood that the plant would be constructed and operated). 438 U.S. at 73-74. The Court expressly reserved the question "whether all the putative injuries identified by the District Court, particularly those based on the *possibility* of a nuclear accident and the *present apprehension* generated by this *future uncertainty*, are sufficiently concrete to satisfy constitutional requirements." *Id.* at 73 (emphasis added). Two members of the Court separately opined that the alleged injuries were far too speculative and remote to warrant Article III jurisdiction. *See id.* at 95 (Stewart, J., concurring in the result); *id.* at 103 (Stevens, J., concurring in the judgment).

[16] *Helling v. McKinney*, 509 U.S. 25 (1993) (JA 197), is inapposite because the plaintiff there alleged *actual, present* health injuries from second-hand tobacco smoke, *id.* at 28, and sought *injunctive* relief to protect himself from further exposure. Moreover, the issue of standing was not addressed by either this Court or the court of appeals.

Those class members should be allowed to sue for themselves. Asbestos disease damages actions are not penny-stock fraud cases that are viable only *en masse*. Any supposed docket-clearing benefits derived from allowing this class action would be drowned in the tidal wave of remote and contingent lawsuits that relaxing prudential standing rules would unleash. "Plaintiffs would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991) (Posner, now C.J.). Thus, "[a]n important purpose of rules of standing is to identify the best-placed plaintiff and give him a clear shot at suit" — and by doing so "to cut down on the number of suits, which is no trivial consideration in this age of swollen federal caseloads." *Id.*[17]

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[17] There is also serious question whether the exposure-only plaintiffs in this diversity suit can show "an invasion of a *legally protected interest*," *Lujan*, 504 U.S. at 560 (emphasis added), sufficient to confer standing, because (as the district court conceded) many states' common law affords no cause of action to protect against mere exposure to a toxin. JA 187; *see also* Appellants' Br. in Ct. App. at 40-41 n.31 (citing cases); Scott D. Marrs, *Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases*, 28 TORT & INS. L.J. 1, 1 (1992)(37 jurisdictions require physical injury as a prerequisite to recovery for emotional distress). This Court has unanimously held that "standing is gauged by the specific common-law ... claims that a party presents." *Int'l Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). The question of whether the plaintiff has a "legally protected interest," and hence standing, is "'a question of substantive law, answerable by reference to'" the rule of law "'whose protection is invoked.'" *Int'l Primate*, 500 U.S. at 77 (citation omitted). The question is not whether the plaintiff will win on the merits of his cause of action, but whether such a cause of action even exists under the law of the governing jurisdiction, and thus whether his allegations of injury, in the context of that cause of action, satisfy Art. III. "[W]hen a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action." *In re Asbestos Litig.*, 90 F.3d at 1025 (Smith, J., dissenting); *see also Angel v. Bullington*, 330 U.S. 183, 192 (1947)(Frankfurter, J.)(*Erie* doctrine "drastically limit[s] the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts"; federal court sitting in diversity "cannot give that which [the state] has withheld."). Since the standing requirement must be fulfilled for every member of the class whom the court's order purports to bind, *see Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 66-67 (1993), the district court was required to conduct a choice-of-law inquiry to determine which states' laws applied to which causes of action asserted on behalf of both the class representatives *and* the absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985). "Any claims not authorized by state law should have been explicitly excised" from the complaint because the district court lacked jurisdiction over them under Art. III. *In re Asbestos Litig.*, 90 F.3d at 1025 (Smith, J., dissenting).

2. The plaintiffs' claims are not redressed by the stipulation for which they seek federal judicial approval

The final element of the Art. III standing inquiry is that it must be "likely" that the injury alleged in the complaint will be redressed by "the desired exercise of the court's remedial powers." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 43, 45-46 (1976). In the usual case, the redressability requirement serves to flush out suits in which the federal court would be issuing an advisory opinion — if the relief sought would not redress the injury brought to the court by the plaintiff, the court's opinion would have only a theoretical connection to the issues presented.

In the present case, the prospect is not a judicial opinion having only theoretical impact on the rights of the plaintiff class, but a judicial opinion having much *more* than "judicial" impact. The approval of this class action settlement would establish a nationwide dispute resolution scheme to supplant state tort law and state courts with respect to anyone in any of the 50 states who might one day develop an injury from exposure to the CCR's asbestos. But the exercise of federal *judicial* power over the class action complaint itself would nonetheless be "gratuitous," and would therefore fail the standing requirement, *Simon*, 426 U.S. at 38, because of the huge discontinuity between the injuries alleged in the complaint and the remedy provided in the settlement, which reveals the representative plaintiffs' lack of any genuine stake in the claims alleged and the relief sought *in the complaint*. *See id.* at 38 & n. 16.

This class action would no doubt have been dismissed if the injury alleged in the complaint had been the lack of an efficient nationwide administrative claims process for asbestos claims. *See Keene Corp.*

v. Fiorelli, 14 F.3d 726, 731-33 (2d Cir. 1993).[18] The fact that the settlement would certainly redress that "injury" cannot obscure the fact that the injuries actually pled in order to provide a jurisdictional hook were very different. Article III's redressability requirement reveals the transparent jurisdictional "bait-and-switch" ploy that the settling parties are attempting.

In this case we need not speculate about redressability, because the stipulated settlement that embodies the plaintiffs' desired judicial remedy was filed simultaneously with the complaint. The exposure-only plaintiffs first allege that they need medical monitoring to "permit early medical diagnosis or treatment" of any asbestos disease they might develop in the future. JA 20. Yet the settlement provides no program for paying for or otherwise furnishing medical monitoring to the plaintiff class, nor does it reimburse class members for any medical monitoring expenses they may already have incurred.

The complaint also claims injury from "emotional distress arising from ... the fear of contracting an asbestos-related condition" in the future. JA 18. Yet the settlement provides no therapy to treat such anxiety and distress, nor does it award damages for that psychological "injury."

Finally, the complaint claims injury in the form of "enhanced risk" of developing asbestos disease in the future. JA 18. Yet the settlement provides no compensation for the allegedly distinct "injury" of this increased risk. The payments available in the event that a class member actually becomes ill cannot be seen as compensating for the increased risk, for few will actually become ill whereas, according to the complaint, all the millions who have been exposed to asbestos are suffering from, and entitled to compensation for, increased risk. Moreover, compensation for actual illness in the future cannot be deemed to redress the currently experienced

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[18] In *Keene*, an asbestos defendant filed a "settlement class action" seeking judicial assistance in negotiating, with an opposing class defined as everyone who might one day sue the defendant, a national asbestos dispute resolution scheme that could be imposed in the form of a judicially approved settlement. 14 F.3d at 728-29. The Court of Appeals vacated an injunction issued to protect this anticipated settlement and ordered the class complaint dismissed, because the only arguably justiciable claim for relief alleged by Keene in its complaint was "transparently pretextual." *Id.* at 731.

increased risk of future illness without acknowledging that "enhanced risk" is in fact not a distinct legal injury covered by a distinct cause of action, but merely a thinly veiled pretext for invoking federal jurisdiction now to resolve nonjusticiable future claims.[19] Indeed, CCR *admitted* below that the settlement does "not resolve any previously asserted claim" but is instead an "agreement structuring the future resolution of as yet unasserted claims." JA 925.[20]

The failure of redressability confirms that the "injuries" alleged in the complaint are but a pretext for conferring jurisdiction on a federal court so that it can endorse a quasi-legislative claims program resolving other, future claims that the plaintiffs have not asserted and cannot assert. Federal courts are not roving commissions empowered to redress ills that have not been brought before them in a justiciable controversy. The redressability requirement, like all "the law of Art. III standing," is "built on a single basic idea — the idea of separation of powers." *Allen v. Wright*, 468 U.S. at 752. The district court opined that "'[e]arly status for Article III standing to be heard is particularly necessary in mass-tort-latent-disease cases'" because the "'courts need to be in a position to intervene as necessary.'" Cert.App. 199a. But a federal court is not free to rewrite the requirements of Art. III to suit what it deems exigent circumstances. The "'Art. III power of the federal courts does not wax and wane in

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[19] The fact that the class plaintiffs may be willing to accept the settlement package in exchange for releasing the claims in the complaint does not prove that it "redresses" those injuries. An insurance scheme may redress a fear of future bankruptcy if one gets ill and cannot work and runs up huge medical bills, but it does not redress current emotional distress about future cancer, nor does it provide medical monitoring to try to treat and defeat any disease in its early stages. To accept that the redressability standard is met whenever plaintiffs would be content with the relief granted is to embrace tautology and to render the redressability element of standing a nullity.

[20] Consequently, the district court explained that exposure-only plaintiffs are forbidden access to the settlement's claims procedure "unless and until they become ill." Cert.App. 273a. Indeed, the court predicated its finding that the settlement was workable and adequately funded on the proposition that these "unimpaired class members" have no injuries to compensate and no benefit claims to present and therefore "do not currently impact significantly upon the case flow predictions under this settlement." *Id.*

harmony with a litigant's desire for a 'hospitable forum.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 476 n. 13 (1982)(citation omitted).

II. THIS CLASS ACTION CANNOT BE CERTIFIED UNDER RULE 23

The issue in this case — even if one *assumed* justiciability for Article III purposes — would *not* be whether a court should consider the substantive terms of a proposed settlement when evaluating class certification, for the Court of Appeals did that. Petitioners instead contend that, once a class action has been settled, the threshold *certification* inquiry mandated by Rule 23(a) and (b) is effectively subsumed by the back-end *fairness inquiry* of Rule 23(e). Once a case is settled, we are told, "the legal and factual questions that remain therefore relate solely to the fairness of the settlement." Pet.Br. 42. The *only* relevant "common question" under Rule 23(a)(2) is "the fairness of the settlement." *Id.* at 42-43. The "predominant questions" under Rule 23(b)(3) "concern the benefits of the settlement." *Id.* at 17. Class members are automatically "typical" under Rule 23(a)(3) because they "now have the same interest in achieving fair compensation." *Id.* at 17. The class action is necessarily "superior" under Rule 23(b)(3) whenever the settlement provides "fair compensation." *Id.* at 11. And representation is adequate under Rule 23(a)(4) so long as "the terms of the settlement are fair." *Id.* at 46.

Petitioners' revision of Rule 23's certification criteria operates at too general a level of abstraction to fulfill the requirements of the Rule and simply begs the crucial question: *Is* this a "class" whose absent members can fairly and properly be bound to *any* settlement negotiated and agreed by the representative plaintiffs, the defendants, and counsel for each? A class consisting of every potential victim that an automobile manufacturer wronged in a given calendar year — whether as a customer injured by price-fixing, an employee injured by racial discrimination, a subcontractor injured by breach of contract, a pedestrian who will be run over in the future by a car built this year with defective brakes, or an unborn child of a neighbor of the defendant's factory, who will someday suffer birth defects from

a toxic spill at the factory — would still have a "common" and "typical" and "predominant" "interest" in the fairness of a settlement that resolved all of their claims. There is no difference in principle between that hopelessly flawed class action and the one at issue here.

To be sure, a court need not close its eyes to the substantive terms of a settlement. For example, a settlement might convince a court that its concerns over manageability (Rule 23(b)(3)(D)) were ill-founded. But that the settlement terms may be *considered* for such limited purposes does not alter the conclusion that a "case" like the instant one cannot be certified under Rule 23.

A. The Criteria of Rule 23(a) and (b) Cannot Be Satisfied Solely by the Substantive Terms of a Settlement

The plain language of Rule 23 does not permit certification predicated solely on the terms of a settlement. Instead, the Rule's criteria refer to issues in *triable* cases. Rule 23(a)(2) (commonality) and Rule 23(b)(3)(predominance), for example, both refer to "questions of law or fact common to the class." This language necessarily is confined to questions of "law or fact" that would arise *in a triable civil lawsuit*, not to "a generalized common *interest*" in securing compensation from a defendant in a settlement. *In re Asbestos Litig.*, 90 F.3d at 1007 (Smith, J., dissenting). Thus, petitioners simply miss the point when they argue that whether their proposed administrative compensation scheme is "'fair, reasonable, and adequate'" (Pet.Br. 10) is a common question of fact. That cannot suffice to meet the requirements of Rule 23. Simply selecting 500 people from the telephone book at random and promising to distribute cash benefits among them will create precisely the same kinds of "common questions" as petitioners have manufactured here.

Similarly, Rule 23(a)(3) (typicality) refers to "the claims or defenses of the representative parties" and "the claims or defenses of the class." The words "claim or defense" in this context — just as in the context of Rule 24(b)(2) — "manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and in the judgment). Rule 23(b)(3) also requires

a court to determine whether "a class action is superior to any other available methods for the fair and efficient *adjudication* of the *controversy*." Further, the factors enumerated as part of the superiority inquiry reaffirm this conclusion. Rule 23(b)(3)(A) refers to the "prosecution or defense of separate actions"; Rule 23(b)(3)(B) refers to "any *litigation* regarding the *controversy* already commenced"; and Rule 23(b)(3)(C) requires an inquiry into the desirability of "concentrating the *litigation* of the claims in the particular forum."

Petitioners' heavy reliance on Rule 23(c)(1), which authorizes district courts to "alter[] or amend[]" their initial rulings on class certification, is wholly misplaced. That provision in no way suggests that a case which could not be *tried* in class form (were defendant to object to certification, for example) should nonetheless be *certified* (if defendant favors certification) solely by reliance on the substantive terms of the settlement. In fact, it authorizes a court to *decertify* a class when subsequent developments indicate that it would *not* be triable in class form. Petitioners also argue that Rule 23 requires a court to examine the actual status of the case before it. But when the actual status of a "case" reveals that it is not a case at all, but a private agreement attempting to gain quasi-legislative effect as a public "law" enforceable against absent persons, there is nothing in Rule 23 to suggest that a federal court thereby acquires jurisdiction to adjudicate it solely because of "questions" fabricated by means of a settlement.

B. Petitioners' Fixation on the Substantive Terms of the Settlement Ignores the Structure and Purpose of Rule 23

1. Petitioners' proposed rule of "settlement cures all" is alien to Rule 23. The class action device is a limited exception to the traditional due process rule that individuals cannot be bound by a judgment in a litigation to which they are not parties. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). In order for the exception to retain constitutional validity, it is vital that the procedural protections afforded absent "parties" by Rule 23 be scrupulously observed. For these protections were "carefully drawn to meet constitutional requirements." 7B Charles Alan Wright, Arthur R. Miller, & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE § 1789, at 251 (1986 & 1995 supp.).

Under the text and structure of Rule 23, each of the provisions of subdivisions (a) and (b) is an independent requirement that must be satisfied, quite apart from the additional barrier created by Rule 23(e), which requires court approval of any settlement. Rule 23's requirements are cumulative, not alternative. Class members are entitled to *all* of the protections provided by Rule 23 and due process, and courts may not pick and choose which of those protections to apply in a particular case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). Further, the structure of Rule 23 forbids collapsing the fairness inquiry of Rule 23(e) into Rule 23(a) and (b)(3). Rule 23(e) refers to the settlement of "a class action" — a term whose requirements are set forth in subdivisions 23(a) and (b) — indicating that the drafters intended that the criteria for a class action be satisfied *before* the court engages in the fairness inquiry mandated by Rule 23(e).

The requirements of Rule 23(a) and (b)(3) are what make the virtual representation of an absent class consistent with due process. They provide overlapping assurances of adequacy of representation, by guaranteeing that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). For example, the commonality and typicality requirements of Rule 23(a) are tests for determining "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be *fairly and adequately protected in their absence*." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (emphasis added). Indeed, the existence of "identical" and "substantial interests" between class representatives and absent class members is so central to the due process requirement of adequate representation that a class action judgment may be collaterally attacked for want of such aligned interests. *Hansberry v. Lee*, 311 U.S. 32, 43-45 (1940); *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 888-90 (1996) (Ginsburg, J., joined by Stevens and Souter, JJ., concurring in relevant part).

Accordingly, there is no basis for collapsing the entire certification inquiry into an examination of the settlement's fairness. Indeed, it is petitioners' proposal that would require a court to engage in a "wholly

artificial inquiry" (Pet.Br. 16) by closing its eyes to the respective positions of the class representatives, members, and counsel during the crucial period of negotiations that led up to the consummation of the settlement agreement. "[T]he Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members," *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 812 (emphasis added) —not merely at the end of the day through the narrow lens of Rule 23(e).

"[E]valuation of the merits of the settlement" cannot compensate for inadequate representation "because an inadequate representative 'taint[s]' the entire settlement process." *Matsushita*, 116 S. Ct. at 889 (Ginsburg, J., concurring) (citation omitted). "'[A]n adequate representative, . . . vigorously prosecuting an action without conflict and bargaining at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative.'" *Id.* Thus, even apart from the axiom that a defect in procedural due process cannot be redeemed by a substantively acceptable result,[21] here there would be no way to use the substance of the settlement, after the fact, to cure defects in the adequacy of representation during the negotiating process. "No one can tell whether a compromise found to be 'fair' might not have been 'fairer' had the negotiating [attorney] . . . been animated by undivided loyalty to the cause of the class." *In re Asbestos Litig.*, 90 F.3d at 1009 n. 42 (Smith, J., dissenting) (internal quotation omitted).

The primary decision relied upon by petitioners (Pet.Br. 29) for their view that adequacy of representation should be collapsed into the fairness inquiry of Rule 23(e) in fact stressed that "the adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party in a conflict position." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 n.25 (5th Cir. 1981).

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[21] *See, e.g., Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988) ("Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result.'") (citation omitted); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions").

Here, it cannot be said that the proof of the pudding is in the eating. "A poisoned or tainted pudding may taste okay, if not delicious."[22]

Furthermore, Rule 23(e) is not designed to substitute for the other safeguards of the Rule. As petitioners' own authorities demonstrate, judicial evaluation of settlements is a "limited inquiry," and "courts have consistently noted the necessity of restraint in their inquiry into proposed settlements." *Smith v. Vista Organization, Ltd.*, 1991 U.S. Dist. LEXIS 10484, *13-14 (S.D.N.Y. July 30, 1991) (cited at Pet.Br. 23 n.10). A court does not "'substitute its business judgment for that of the parties who worked out the settlement.'" *Id.* at *15 (citation omitted). To the contrary, it accords the opinion of counsel "'considerable weight.'" *Id.* at *16 (citation omitted). "There is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) (cited at Pet.Br. 24).[23] The framers of Rule 23 therefore properly declined to put all the due process eggs in the relatively small 23(e) basket.

2. Petitioners would erode the protections of Rule 23 precisely when they are needed most. In an adversarial class action, the defendant has a powerful incentive to expose problems with class counsel, the definition of the class, and other matters. Usually, defendants mount such challenges (on behalf of absent members of the plaintiff class),[24] which help filter out instances in which class

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[22] Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 18 (1995).

[23] *See also Woodward v. NOR-AM Chem. Co.*, 1996 U.S. Dist. LEXIS 7372, at *46 (S.D. Ala. May 23, 1996) (trial court "'should be hesitant ... to substitute its own judgment for that of counsel.'") (citation omitted) (cited at Pet.Br. 25 n.10); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985) ("In deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.").

[24] At least half of all class action defendants challenge certification, usually contesting the representativeness of the named plaintiffs and the commonality of the issues facing different class members. Thomas E. Willging, Laura L. Hooper & Robert J. Niemic, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL

counsel and named plaintiffs will not adequately protect the interests of absent class members.

In the settlement class action context, however, a defendant's incentives are exactly reversed. A defendant who has already settled will not thereafter dispute certification to protect absent class members. Instead, it will join with class counsel to urge certification of the class and approval of the settlement. When a court is deprived of adversarial presentation on the issues surounding the class action, even the unusually industrious judge labors under a handicap. *See*, e.g., MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45, at 243 (1995) (early settlement decreases the amount of information available to the court).

Moreover, petitioners' proposed rule gives class counsel every incentive to disserve their purported clients. In practice, class members have little or no control over class counsel, who in fact often choose the class representative. *See In re Asbestos Litig.*, 90 F.3d at 1009 (Smith, J., dissenting). In this case, for example, the class representatives had only the vaguest ideas about the class action and the settlement. *See* p. 14, *supra*.

Yet petitioners' proposal encourages class counsel to compete to sell out the claims of absent persons in order to gain the defendant's acquiescence to a settlement class action. Or the defendant could simply hand-pick purported plaintiffs' counsel for settlement "negotiations," as occurred in this case. A reverse auction — a race to the bottom — would ensue, in which defendants could "sell" the lucrative right to be plaintiff class counsel to the lowest bidding attorney. *See* Coffee, *Class Wars*, 95 COLUM L. REV. at 1354, 1372-73. If the first plaintiffs' lawyers approached by the defendants refused an unfair offer of settlement, the defendants could simply offer the settlement to another lawyer, and so on, until the defendants found an attorney willing to play along. Faced with these alternatives, even the most scrupulous lawyer might feel justified in accepting a

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DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 36 (Federal Judicial Center 1996) ("1996 Federal Judicial Center Study"). In fact, disputes regarding the ability of the representatives were the most frequent objections. *Id.* at 37. These are serious challenges, usually involving substantial briefs and judicial opinions. *Id.* at 36-37.

poor settlement offer, because the next firm approached by the defendants might be willing to accept an even lower offer from the defendants.

When a settlement class action cannot be be tried, a plaintiffs' lawyer cannot use the threat of litigation as leverage to encourage the defendant to strike a fair deal. The only bargaining strategy available to plaintiffs' lawyers is one of concessions: to agree to divest absent class members of the right to sue in other proceedings (either in individual proceedings or in class actions in state court) and to propose greater and greater discounts of the victims' claims. A system of all "carrots" and no "sticks" is not likely to produce a fair bargaining process for absent members of the class. And the problem is compounded by petitioners' insistence that it would be wholly improper for a court even to inquire, as part of the adequacy of representation review, as to the "resources, willingness, and experience to see the litigation through discovery, trial, and any appeals." Pet.Br. 29 n.12. It is difficult to see how absent class members could be adequately represented by an attorney hand-picked by the defendant who is unable and unwilling to threaten to take the case to trial.

Further, even the most independent plaintiff's attorney is subject to a crippling conflict of interest: the attorney can profit only if the proceeding is settled, whereas the absent clients may fare much better if their claims were resolved elsewhere. *See In re Asbestos Litig.*, 90 F.3d at 1001 (Smith, J., dissenting) ("a defendant may pick his opposing counsel and then negotiate with absolutely nothing to lose from walking away from the deal; class counsel, on the other hand, work *pro bono* unless they consent to a settlement"). Because a genuine class action is not an option, the class attorney gains *only* if the settlement class is certified (however unsatisfactory the relief), while the class may do much better if the settlement class is *not* certified (and they sue later, for example, when their individual claims mature). Class counsel may often be the lawyers most willing to join with the defendant to help convince a court to accept a settlement providing inadequate benefits to class members by undervaluing their own clients' claims and by arguing that the stingy recovery provided by the settlement should be valued at some inflated rate.

Thus, the petitioners' vision is one in which the plaintiffs' lawyers

least committed to the class's interest and most willing to cooperate with the defendant in exchange for an award of attorney's fees, are most likely to serve as class counsel. Moreover, a court's fairness judgment is heavily dependent on the joint petition of class counsel and the defendant. *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.43 (1995) ("Counsel for the parties are the court's main source of information concerning [a class action] settlement."). Accordingly, the lack of an adversary relationship between class counsel and the defendant greatly undermines the ability of courts to assess the proposed settlement in fairness hearings. This system, which "creates an unparalleled opportunity for collusion between defendants and class counsel," *In re Asbestos Litig.*, 90 F.3d at 1000 (Smith, J., dissenting), virtually guarantees *inadequacy* of representation.

3. The empirical evidence confirms the importance of the procedural protections afforded by Rule 23 — and the danger of petitioner's proposal to collapse those various safeguards into the fairness inquiry of Rule 23(e). A recent study by the Federal Judicial Center showed that, in more than half of the fairness hearings (more than 60% in some jurisdictions), the court hears from no objector. 1996 Federal Judicial Center Study at 57, 178. Further, "[t]he most frequent type of objection was to the amount of the attorney's fees." *Id.* at 57. Thus, in the vast majority of cases the court hears only a non-adversarial presentation by two sets of lawyers (class counsel and the defendant's attorneys) explaining that the settlement is fair and that counsel represented the class in exemplary fashion. The district court spends minimal time on the fairness issue, and significantly more time encouraging the parties to settle.[25] Not surprisingly, even in litigated class actions, courts approve more than 72% of proposed settlements, and in one district the figure is 100%. *Id.* at 179. There can be little doubt that the approval rate in settlement class actions is even higher.[26]

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[25] On average, a district judge spends only 0.4 hours on the issue of the notice to class members, and only 2.8 hours reviewing and ruling on the proposed settlement. 1996 Federal Judicial Center Study at 169. By contrast, the typical judge spends 7.2 hours on class certification issues in contested cases, 3.5 hours facilitating settlement, and 2.3 hours ruling on attorney's fees. *Id.*

[26] Commentators analyzing the Federal Judicial Center data have concluded that the average class member recovers nearly 50% more ($848, compared to $573) in settlements reached after a case was certified for litigation than in settlements reached before certification — even though the average award of attorneys' fees is basically the same in both kinds of class actions. In other words, class members typically receive significantly less from "settlement class actions" but pay about the same amount in attorneys' fees. Letter of Anne W. Bloom and Trial Lawyers for Public Justice to Hon. Alicemarie Stotler, Standing Committee on Rules of Practice and Procedure (June 14, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.).

In these circumstances, it is simply unrealistic to expect Rule 23(e) to bear the enormous weight that petitioners would assign to it. As Chief Judge Posner has explained, the danger of a "premature, even a collusive, settlement is increased" when the status of the action as a class action is not determined until a settlement has been negotiated, "with all the momentum that a settlement agreement generates." *Mars Steel Corp. v. Continental Illinois National Bank*, 834 F.2d 677, 680 (7th Cir. 1987). Judge Friendly agreed that "[a]ll the dynamics conduce to judicial approval of [the] settlement[] once the adversaries have agreed." *Allegheny Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting), *aff'd en banc by equally divided court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966). And the parties "may even put one over on the court in a staged performance." *Kamilewicz v. Bank of Boston*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., joined by Posner, C.J., and Manion, Rovner, and Wood, JJ., dissenting from denial of rehearing en banc).

C. Article III, the Separation of Powers, Principles of Federalism, and the Rules Enabling Act All Strongly Militate Against the Petitioners' Construction of Rule 23

1. This Court has always understood the federal judicial power to be confined to the adjudication of cases and controversies *triable* in federal court. *See* Part I(A), *supra*; *see also Gordon v. United States*, 117 U.S. 697, 699-706 (1865); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 48-52 (1852) (claims processing under international treaty is not judicial function); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (resolution of pension claims asserted

by Revolutionary War soldiers fell outside federal judicial power).

Petitioners' approach would convert federal courts into mediation forums with essentially lawmaking powers. Any tortfeasor could impose an administrative compensation scheme on its future victims by orchestrating a nationwide class "action" with the cooperation of compliant plaintiffs' attorneys. And any party could evade the limits of Art. III by presenting a non-triable matter in class action settlement form for federal judicial approval. Even if "[s]eeking out and notifying sleeping potential plaintiffs" of their claims were wise policy, the federal courts are confined to the "'passive' role" of ruling on the claims that come before them, as part of "the natural components of a system in which courts are not inquisitors of justice but arbiters of adversarial claims." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 181 (1989) (Scalia, J., joined by Rehnquist, C.J., dissenting).

2. Petitioners' argument is also problematic under the Rules Enabling Act, 28 U.S.C. § 2072, which restricts the judicial rulemaking power to "general rules of practice and procedure" and explicitly forbids this Court from making rules which "abridge, enlarge or modify any substantive right." § 2072(b). This restriction rests on fundamental principles of separation of powers and federalism. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 412 (1990) (Stevens, J., dissenting).[27]

Although the line between "general rules of practice and procedure" and substantive law is at times a shadowy one, it sheds bright light here. *See* Paul D. Carrington & Derek Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Invalidity of Proposed Rule 23(b)(4)*, 38 ARIZ. L REV. (forthcoming 1997).

• Approval of a settlement eliminates valuable state-law causes of action. The settlement replaces state law — which currently supplies the appropriate standard of care, damages, statutes of limitations, and

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[27] *See Hanna v. Plumer*, 380 U.S. 460, 469-70, 472 (1965); *Byrd v. Blue Ridge Electrical Cooperative, Inc.*, 356 U.S. 525, 536-37 (1958); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202-05 (1956); *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-10 (1945); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943); *see also* Fed. R. Civ. P. 82.

the appropriate law of judgments — with strict medical criteria and compensation schedules, which in effect establish a nationwide applicable law. The Judicial Conference Ad Hoc Committee on Asbestos Litigation recognized in its March 1991 Report that any "national solution" to the asbestos problem would intrude on "an area of tort liability traditionally within the province of the states." Report at 3. After receiving strong objections from state judges, the Committee declined to make any specific legislative proposals because of these "major federalism problems."[28]

• A settlement overrides myriad variations in substantive state-law rights and duties, creating a hybrid creature which operates "in accordance with no actual law of any jurisdiction." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). Indeed, one of the alleged advantages of the settlement-only class action is that it enables a court to dispose of thousands or even millions of potential cases without even having to stop to notice the substantive differences among them. Here, for example, the uncontradicted evidence is that mesothelioma victims in California are able to proceed promptly to trial and receive on average verdicts that are 53% higher than those in other states. JA 351-52. The California average is more than 209% above the maximum allowable recovery in the settlement. JA 461. Even petitioners concede that plaintiffs in a few states are currently able to assert, in individual actions, claims for medical surveillance, emotional distress, and increased risk of cancer, while other plaintiffs are unable to do so. Pet.Br. 6-7 & n.3. The settlement ignores all of these differences.

• The settlement in this case purports to resolve the rights of "future" claimants, even though they may well not know that those rights exist and even though, under the laws of at least some states, "[a] general release is inapplicable to an unknown claim."[29] In addition, the settlement extinguishes claims by families of class

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[28] Testimony of Comm. Reporter Mary Kay Kane, Fairness Hrgs. Tr. Vol. 1, at 200-01.

[29] *Farm Credit Bank of St. Louis v. Whitlock*, 581 N.E.2d 664, 667 (Ill. 1991). *See also* Cal. Civ. Code § 1542; *Fair v. International Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1115 (7th Cir. 1990).

members, including the claims of children yet to be born and spouses yet to be married. Cert.App. 23a n.3. For example, the minors in the class receive no representation and no compensation for loss of consortium claims — even though they are recognized by the laws of at least thirteen states, *see Guenther v. Stollberg*, 495 N.W.2d 286, 287 (Neb. 1993) (citing cases), and even though under the law of many states, a waiver of liability entered into by a parent before the minor child's cause of action accrued is invalid. *See, e.g., Meyer v. Naperville Manner, Inc.*, 634 N.E.2d 411, 414 (Ill. App. 1994) (citing cases); *cf. Clark v. Jeter*, 486 U.S. 456, 463-64 (1988); *Mills v. Habluetzel*, 456 U.S. 91, 99-100 (1982).

• A settlement class action depends on the creation of a fictional contract of employment and a fiduciary agency relationship between members of the class and class counsel. MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45, at 244 (1995). It is elementary agency law that, in ordinary cases, a client is entitled to reject a settlement negotiated without explicit advance approval. *E.g.*, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 33(1) (1996). In the typical (b)(3) situation, the predominance of preexisting common questions is held to modify the substantive right of a client to reject a settlement, by implying an authority in law to settle claims, subject to court approval. But petitioners would take matters an enormous leap further, by implying settlement authority even in the absence of predominating common questions. According to petitioners, the settlement itself can be used to bootstrap common interests among the class members and thereby confer unprecedented authority on class counsel. A handful of lawyers meeting alone in a room can decide amongst themselves the benefits to be accorded to millions of persons who will be killed or seriously injured by asbestos — without any express negotiating authority from these persons (indeed, without any knowledge, for the most part, of their identity). Such an extraordinary unilateral assumption of power effects a huge and problematic change in the substantive law of agency.

A reinterpretation of Rule 23 that is fraught with such serious substantive consequences is not appropriate for promulgation by this Court.[30] For the last quarter century, there has been growing mistrust

[30] The Judicial Conference Advisory Committee on Civil Rules is currently considering changes in Rule 23 with respect to settlement classes. Cert.App. 58a-59a; Pet.Br. 18. The Rules amendment process devised by Congress should be allowed to run its course. Indeed, proposals to liberalize settlement class actions have been harshly criticized. Judge John McBryde of the Northern District of Texas objected to the amendment because it would "tend to defeat safeguards built into Rule 23 against improper class action activity." Letter to Peter G. McCabe, Secretary of the Committee on Rules and Practice (Oct. 4, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.). More than 150 law professors have written various letters to the Advisory Committee to urge that the measure be rejected. *See, e.g.*, Letter to Hon. Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure, from 145 Professors of Law (May 28, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.). The proposed amendment would not change the result in this case. *See* Part III, *infra*.

of judicial rulemaking, in Congress and among the profession.[31] The 1966 revision of Rule 23 had a substantial impact on substantive rights and sparked a "holy war" over the creation of opt out classes.[32] As Professor Wright has said, the rule has been put "in jeopardy" by "those who embrace it too enthusiastically." Charles Alan Wright, LAW OF FEDERAL COURTS 520 (5th ed. 1984); *see also* 7A Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1753, at 46 (1986) (noting that "Rule 23 has come into disrepute" and "rumblings of discontent have been heard from certain members of the bench and bar ever since the promulgation of the new rule").[33]

[31] *See, e.g.*, Paul D. Carrington, *The New Order in Judicial Rulemaking*, 68 JUDICATURE 131 (1991); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993); Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1 (1994).

[32] Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 664 (1979).

[33] The 95th and 96th Congresses, for example, considered proposals to amend Rule 23 at the behest of the U.S. Department of Justice. *See* S. 3475, 95th Cong., 2d Sess. (1978); H.R. 5103, 96th Cong., 1st Sess., Tit. I (1979); *see also* Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299 (1980). In the 1980s, two sections of the American Bar Association simultaneously advanced different suggested reforms of the rule. *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195 (1986). The ABA House of Delegates took no position on either, but referred the issue to the Civil Rules committee where they were tabled along with

That Rule 23 was, and remains, one on which factions divide is itself a telling signal. Professor Carrington has observed that, "[i]n hindsight, it might have been wise for the committee, and the Court, in 1966, to have drawn paragraph (b)(3) more narrowly to avoid the risk of altering substantive entitlements, or to suggest its enactment by Congress in lieu of its promulgation by the Court."[34] As Professors Arthur Miller and David Shapiro have commented, "[t]he whole field of class actions is one that has always fallen on the edge of the rulemaking power delegated to the Supreme Court under the Enabling Act."[35] Petitioners' proposal for a radical expansion of Rule 23 would only exacerbate the concerns of many that the rulemaking process has overstepped its bounds to the point where substantive state-law rights are being extinguished.

D. The Lower Court Consensus on the Meaning of Rule 23 Undermines — Not Supports — Petitioners' Proposal

Petitioners insist that there is a "judicial consensus" regarding their interpretation of Rule 23. Pet.Br. 22. "But it has never been the rule that federal courts, whose jurisdiction is created and limited by statute, acquire power by adverse possession." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 839 (1989) (Kennedy, J., joined by Scalia, J., dissenting). In any event, the fact is that *no court has ever certified a class action like this one*. Even the Fifth Circuit, in its recent decision in *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), explained that, if it had confronted the facts of this case, it "would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses,

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all earlier suggestions.

[34] Letter to the Standing Committee on Rules of the Judicial Conference of the United States (May 21, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.).

[35] Letter to Hon. Alicemarie H. Stotler (May 23, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.).

smoking histories, and family situations." *Id.* at 976 n.8.

There is no legitimate support for petitioners' view that a class may be certified solely by reference to a settlement, even if it is not triable in court. The first version of the Manual for Complex Litigation disapproved of the use of settlement class actions altogether — whether or not they were triable in federal court. MANUAL FOR COMPLEX LITIGATION § 1.46, at 60 (4th ed. 1977). The Manual explained that "[t]here can usually be no assurance that the class members will be adequately represented in the settlement negotiations" and no assurance "that the tentative class will be composed of members without conflicting interests." MANUAL FOR COMPLEX LITIGATION § 1.46 (5th ed. 1982).

The Manual, Second, warned that "[o]rdinarily, a class action determination should be made not only before a settlement is reached, but indeed before settlement discussions are commenced." MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.45, at 243 (1985). "[T]he fairness of the settlement may be very difficult to assess." *Id.* "Settlement classes should be considered only in connection with settlements that are likely to have little opposition from class members." *Id.*

The current version of the Manual lends no support to petitioners' theory. It states only that defendants may provisionally consent to certification for settlement purposes while preserving the right to contest it if the settlement is not approved. MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45, at 243 (1995). The Manual cautions that settlement class actions "raise numerous issues, including conflicts of interest," "conflicts between class counsel and counsel for individual plaintiffs," and "administration of claims procedure." *Id.* at 244. It further warns that "persons who may not currently be aware that they have a claim or whose claim may not yet have come into existence. . . cannot be given meaningful notice," and their opt-out rights "may be illusory." *Id.*

None of the cases cited by petitioners holds that the criteria of Rule 23(a) and (b) may be satisfied solely by reference to the terms of a seemingly fair settlement, so that a non-triable class action may nonetheless be certified. For example, in *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) (cited in Pet.Br. at 22 n.9), the court held merely that Rule 23 permits courts to approve settlements

despite their having been reached prior to class certification. Nowhere in *Weinberger* did the court license the settlement of non-triable cases. In fact, the court of appeals warned of "the possibilities of collusion or of undue pressure by the defendants on would-be class representatives." 698 F.2d at 73.[36] The Third Circuit itself canvassed the cases cited by petitioners and found that, although some of them appeared in dicta to have "assumed that lower standards apply in settlement class cases," no prior court had squarely addressed the question. *GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 798 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (*GM Trucks*). The primary "authority" for a different certification

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[36] *White v. National Football League*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995), held only that a settlement's terms may inform the court's findings with respect to adequacy of representation — a proposition that is not in conflict with the Court of Appeals' decision in this case.

• *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), analyzed certification as if the class were going to be litigated. *Id.* at 727-28. It upheld certification because "the question whether Aetna was a jointfeasor here was the critical issue common to all the cases against Aetna, and one which, if not established, would dispose of the entire litigation." *Id.* at 747.

• *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539 (11th Cir. 1987), noted that "this case is meaningfully different" from a "settlement certification" because "[t]he district court certified a class action prior to the commencement of settlement negotiations." *Id.* at 1543. "None of the parties challenge[d] the district court's holding that [the Rule 23(a)] prerequisites were satisfied." *Id.* at 1544 n.5.

• In *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982), the district court had *already* certified the class for litigation purposes, both under Rule 23(b)(2) and Rule 23(b)(3), before the parties reached a settlement.

• In *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979), the court approved the use of "temporary" or "tentative" settlement classes to promote settlement negotiations without requiring a defendant to waive possible objections to certification. *Id.* at 177. No party denied that the case was "triable in class form." *Id.* at 174. The court acknowledged that even this use of settlement classes (which the Third Circuit in the instant case endorsed) was "'controversial,'" *id.* at 178 (citation omitted), and presented the danger that "temporary class members [could be] forced to accept settlement absent an informed choice." *Id.* at 176.

approach in settlement-only classes is found not in the case law, but in the treatise of Professor Newberg, NEWBERG ON CLASS ACTIONS (3d ed. 1992). *See GM Trucks*, 55 F.3d at 799. Not surprisingly, petitioners rely heavily on this commentator.

Petitioners also cite a series of district court decisions (Pet.Br. 23-25 n.10), but none held that the criteria of Rule 23(a) and (b) may be satisfied solely by a settlement. In some of the cases, courts expressed uncertainty about whether the class before them could be certified for litigation, but in none of the cases did the parties *concede* that the case would not and could not be tried in the absence of the settlement.[37] In fact, the cases prove our point. There was usually no opposition by objectors. There was no adversarial presentation. Both class counsel and defendants sought to win approval of the settlement by detailing the many purported barriers to class certification. Paradoxically, the difficulty of maintaining suit in class form was treated as a reason *in favor of* extinguishing the claims of absent class members through settlement — even though class members' interest in managing their own claims through separate lawsuits is typically at its zenith precisely where class litigation is most impracticable. Because the cases were settled, class counsel's self-deprecating observations about their own prospects for maintaining a litigation class were only untested speculation — and were in fact self-serving. In short, none of the lower court cases supports petitioners' efforts to effect an unauthorized expansion of Rule 23.

E. Petitioners' Policy Argument is Misdirected

Finally, petitioners are left to arguing policy. More than fifteen times, their brief cites the supposed "practical" and "efficiency"

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[37] Some decisions noted the "risks" of settlement class actions and the possibility of "collusion." *E.g., In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 307-08 (D. Mass. 1987) (cited in Pet.Br. at 23 n.10); *In re First Investors Corp. Sec. Litig.*, 1993 U.S. Dist. LEXIS 18044, *11 (S.D.N.Y. Dec. 22, 1993) (cited in Pet.Br. at 23 n.10); *see also Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1560 (1976) (cited in Pet.Br. at 24 n.10) (settlement class should not be permitted "if the expanded class includes unresolvable conflicts which would have prevented the class suit from going forward").

values served by their proposal. But Fed. R. Civ. P. 1 provides that the Rules are to be construed to secure the "just" — and not simply the "speedy" or "inexpensive" — determination of every action. And, in any event, petitioners' policy arguments are deeply flawed.

Petitioners maintain that the judgment below would "foreclose the use of class actions to settle mass tort cases." Pet.Br. 37. On the contrary, the Third Circuit expressly endorsed settlement class actions. Cert.App. 37a n.9. Further, petitioners' own statistics reveal that more than 60% of all class actions were certified for litigation rather than for settlement purposes only. Pet.Br. 24. And in only 18% of certified class actions was a proposed settlement submitted to the court before or simultaneously with the first motion to certify. Willging, Hooper, & Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Changes*, 71 N.Y.U.L. REV. 74, 112 (1996). It is likely that even many of these 18% were in fact litigable, and only the class counsel's desire to win approval of the settlement led them to stress the difficulties of certification.

Petitioners also ignore the fact that only the Fifth Circuit, in *In re Asbestos Litig.*, has embraced a "settlement cures all" approach. And even the Fifth Circuit indicated that it would have reached the same result as the Court of Appeals in this case. Accordingly, it simply cannot be said that affirming the judgment here would alter the current administration of Rule 23 in the federal courts.

Petitioners also predict docket congestion as a result of the Court of Appeals' decision. Yet the instant class consisted almost exclusively of "futures" claimants who do not suffer (and will likely never suffer) from any asbestos disease. The vast majority of these "claims" are phantoms that will never materialize as viable lawsuits. CCR itself has pointed out that asbestos claims have "crest[ed]" and that references to the number of claims filed in various federal courts are "misleading" because they fail to take into account the fact that "hundreds of thousands of new claims" have been filed only because of "radical consolidation or class action techniques." JA 432-33. In any event, the only claims that would be settled here exert minimal docket pressure: historically, CCR has settled 99.8% of its cases. JA 125 n.18.

In fact, petitioners' proposal — far from offering a pragmatic solution — itself carries great risks of docket congestion and other

incalculable harm that would be directly triggered by exceeding the limits of Art. III, due process, and Rule 23. Petitioners would expose the federal courts to the potential claims of tens of millions of Americans who have been exposed to asbestos and other toxins, but who have not yet, and probably never will, manifest any injuries. Petitioners would expose the federal courts to sham "settlement" class actions — and myriad other proceedings — that could never be litigated. In short, yielding to the siren song of expediency would in the end prove as foolish from a purely pragmatic viewpoint as it is unprincipled.

III. THE JUDGMENT WOULD HAVE TO BE AFFIRMED EVEN IF PETITIONERS PREVAILED ON THE QUESTION PRESENTED

Even if petitioners were to prevail on the question presented, the judgment below would still have to be affirmed, because it is plain that this unprecedented "futures" class cannot be certified even if the settlement is fully considered. Indeed, contrary to petitioners' repeated chant, the Court of Appeals below did *not* "ignore the existence of the settlement." Pet.Br. i. The court carefully examined the settlement's terms in the course of holding that the Rule 23 criteria could not be satisfied. Cert.App. 49a-57a. Even petititoners' own amicus concedes that the Third Circuit "acknowledged that '[c]ertainly, evaluating the settlement can yield some information relevant to the adequacy of representation determination under 23(a)(4).'" Wash. Legal Found. Br. 12 (citation omitted).[38]

1. Adequacy of representation. The Third Circuit explained that intra-class conflicts are reflected in the details of the settlement

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[38] In the Court of Appeals, respondents and other objecting class members directly challenged only the preliminary injunction; attacks on the district court's non-final determination that the settlement was fair were reserved for any appeal from a final judgment. Cert.App. 24a n.4, 34a-3a, 276a. Thus, petitioners' repeated attempts to argue the supposed fairness of the settlement (Pet.Br. 4-6, 13-15) improperly raise a matter not before this Court. The Third Circuit considered aspects of the settlement as part of its inquiry into certification under Rule 23(a) and (b); it did not pass on the overarching question (which was not before it) of the settlement's fairness. We follow the Court of Appeals' approach.

agreement itself. Even if it could be said that class members share a general interest in obtaining compensation (Pet.Br. 46-47) and in "achieving a global settlement" (*id.* at 48), a *structural* conflict among class members as to how that settlement is distributed would remain. "[T]he settlement does more than provide a general recovery fund" — "it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." Cert.App. 49a (emphasis in original). For example, the settlement makes compensation available for some claimants at the expense of others: "under the settlement many kinds of claimants (e.g., those with asymptomatic pleural thickening) get no monetary award at all," and "[t]he settlement makes no provision for medical monitoring or for payment for loss of consortium." *Id.* Morever, the settlement aggravates the intractable conflict of interest between "present" and "futures" plaintiffs because it contains no inflation adjustment, no method of accounting for future developments in scientific knowledge, no back-end opt-out (so that class members can choose whether to opt out when and if their injury occurs), and no guarantee that the defendants will remain in the settlement after ten years. *Id.* at 50a.

Adequacy of representation is a conclusion of law which cannot be insulated from appellate review by wishfully labelling the district court's determinations "factual findings." Pet.Br. 44 n.22. Indeed, virtually all of the supposed "findings" on which petitioners rely (especially with respect to adequacy of representation) (Pet.Br. 10-12, 42-44) were conclusions of law *and labelled as such by the district court*. Cert.App. 223a ("Conclusions of Law"). The Court of Appeals' holding of inadequate representation did not depend on any disagreement with the district court's findings as to class counsel's credentials (Cert.App. 48a-49a), but rather on the presence of inherent conflicts among class members. The clearly erroneous rule does not apply where findings of fact are made under an erroneous view of controlling legal principles or where they represent disguised conclusions of law.[39]

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[39] *Davis v. Bandemer*, 478 U.S. 109, 142 n.20 (1986) (plurality opinion); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323 (1974); *United States v. General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966); *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 n. 9 (1963); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *see also Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (cited at Pet.Br. 44 n.22) (if court of appeals "believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment").

Moreover, the undisputed evidence — and even some of the district court's findings — confirm the conflicts of interest and inadequacy of representation. For example, that court found that the plaintiffs' bar was aware that CCR would not settle inventories of pending cases "without some protection for the future." Cert.App. 183a. CCR itself admitted that it entered into the inventory agreements only because of the *Georgine* settlement (p. 3, *supra*) — creating an intractable conflict of interest because the present and future claims were settled on vastly different terms. For example, the Ness Motley individual claims that were settled in the inventory side agreement received $138 million, while "[u]nder the terms of the class settlement, the individual plaintiffs would have been entitled to a *maximum* of about $90 million." *In re Asbestos Litig.*, 90 F.3d at 1011 (Smith, J., dissenting).[40]

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[40] • There was no documentary evidence that class counsel adequately represented absent class members during the purported negotiations that led to the settlement. The objectors were not permitted to depose class counsel. The objectors were denied time records of class counsel during the relevant period. JA 326.

• During the negotiation of the case flow numbers, class counsel did not present CCR with data indicating that the caps would not compensate enough victims. As a CCR officer testified, "I don't recall any review of data." JA 448.

• Class counsel did not participate in designing or administering the notice campaign, JA 490-92, even though class counsel's ethics advisor testified that he had repeatedly "emphasized" to class counsel the vital importance of the notice campaign and the gravity of class counsel's responsibility for ensuring notice to as many class members "as humanly possible." JA 907.

• The class representatives did not represent the interests of exposure-only plaintiffs and pleural claimants. JA 356-57 (Baumgartner's view that pleural claimants should not receive compensation because "I think they are not suffering from that yet" and "I don't believe they should be compensated by anyone"); JA 692, 694-95 (Annas concedes that he was not "an appropriate spokesman" for

2. Superiority. The Third Circuit also considered the settlement in concluding that this case does not satisfy the "superiority" requirement of Rule 23(b)(3). Cert.App. 54a-57a. The Court of Appeals focused on the fairness prong of the superiority requirement: "it is obvious that if this class action settlement were approved, some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action." Cert.App. 57a. "Problems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be *insurmountable*." *Id.* at 55a (emphasis added).

Because asbestos-related illnesses like mesothelioma may be caused by slight and incidental exposure to asbestos, many currently uninjured class members (especially spouses and children) may not know that they have been exposed to asbestos within the terms of the class definition. Cert.App. 55a. Even if they know of their exposure, such as-yet uninjured class members "may pay little attention to class action announcements" and are "unlikely to be on notice that they can give up causes of action that have not yet accrued." *Id.* "Many must have treated even individual written notices — if they received any — as junk mail." Br. of the State of Texas as Amicus Curiae in Ct. App. at 3 (filed Feb. 27, 1995). And even if those currently uninjured class members find out about the class action and realize that they fall within the class definition, "the class members lack any basis for

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pleural claimants who continued to work because he believed that "[p]eople that are not impaired are exactly like those on the welfare system" and should receive "no compensation whatsoever").

• Class counsel gerrymandered the boundaries of the class "improperly [to] manipulate[] the scope of the class for reasons of their own." *GM Trucks*, 55 F.3d at 787. The boundaries of this class were drawn not in terms of the supposedly common issues of law and fact alleged in the class complaint, but entirely in terms of which plaintiffs the class counsel chose to include in the inventories they would settle on the eve of the class settlement, and which plaintiffs class counsel chose instead to put on the class settlement side of the boundary. Thus, Nafssica Kekrides was placed in the class even though she had authorized her counsel to bring suit on Sept. 8, 1992, JA 384, which was fully four months before the Jan. 15, 1993 class action cut-off date. Her testimony reveals that she was never informed by class counsel that she might have been put in the inventory rather than the class. Yet the inventory side deals included a number of unfiled claims. JA 765.

making an informed decision on whether to remain in the litigation. At best, class members could only guess whether the proposed settlement would be beneficial or detrimental to their interests." Br. of State of Alabama as Amicus Curiae in Dist. Ct. at 4 (filed Apr. 29, 1993).

Similar concerns animated this Court's decision in *Urie v. Thompson*, 337 U.S. 163, 170 (1949), which held that an individual who had contracted silicosis could not be required to act on his claim before it accrued. The same concerns underlie the insistence of petitioners' own authorities that "futures" class actions contain a back-end opt out right. Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 967 (1995) (cited in Pet.Br. at 47); *see also Bowling v. Pfizer*, 143 F.R.D. 141, 170 (S.D. Ohio 1992), *appeal dism'd*, 995 F.2d 1066 (6th Cir. 1993). The Court of Appeals explicitly cited the absence of a back-end opt-out right in the settlement in holding that the superiority standard could not be met. Cert.App. 56a n.16.

There is no reason for this premature extinguishment of "futures" claims. The vast majority of claims will not come to pass. *See* pp. 19-20, *supra*. The CCR defendants are "in very good financial condition," Cert.App. 161a; their assets do not constitute a limited fund. *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 318 (E.D. Pa. 1994). When claims do arise, they can be settled individually or *en masse* (CCR traditionally settles 99.8% of the claims against it, JA 125 n.18) or litigated in consolidated proceedings or more narrowly defined class actions. Cert.App. 57a.

In fact, because most if not all class members were also exposed to asbestos products of non-CCR defendants, class members will in any event have to pursue many other asbestos defendants in the tort system in order to obtain full compensation for their injuries. They will, therefore, have to file *both* administrative claims against CCR *and* tort suits against other defendants, which makes the settlement more burdensome than the present system. And the strict case flow controls in the settlement mean that there is no assurance of timely administrative compensation, even at the inadequate levels provided.

3. Predominance and typicality. As the Court of Appeals properly found in holding that the typicality requirement was not met, "this class is a hodgepodge of factually as well as legally different

plaintiffs." Cert.App. 53a. Class members will sustain different injuries, giving rise to different claims under the laws of all 50 States.

Petitioners contend that the "fairness of the settlement" is a common question among the class members. Pet.Br. 42. But such a generalized (indeed, tautological) interest obviously cannot suffice to meet the criteria of Rule 23. *See* Part II(A) and (B), *supra*. Even if it could, viewing the class members through the lens of the settlement simply underscores the lack of commonality among them. The settlement severely undercompensates California mesothelioma victims and other class members who, depending on the state law applicable to their claim, would receive far more than the settlement schedules provide. The settlement denies all compensation to those with loss of consortium, medical monitoring, and pleural claims — in order to achieve greater compensation for others. The settlement exacerbates the differences between present and future claimants. In short, if each claimant has an interest in the settlement's being fair to *her*, such an interest is at odds with that of her fellow class members.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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